

## The EEOC's Updated Guidance for Employers

### Related Practices

COVID-19 Task Force

### By Peabody & Arnold on April 22, 2020

The Equal Employment Opportunity Commission (EEOC) updated its publication [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) to provide employers with additional guidance to navigate through the unprecedented challenges workplaces are experiencing during the COVID-19 pandemic.

This post provides a summary of the key updates from the EEOC's publication and is not exhaustive of all of the guidance provided by the EEOC.

### **Disability-Related Inquiries, Requests for Accommodations, and the Interactive Process**

The already difficult task of meeting the obligations imposed on employers by the Americans with Disabilities Act (ADA) has become more challenging during the COVID-19 pandemic. In order to assist employers in complying with such obligations in these unprecedented times, the EEOC provided the following guidance:

#### ***Making Medical Inquiries and Maintaining Confidentiality***

- During the pandemic, if employees call in sick, employers may ask such employees if they are experiencing COVID-19 related symptoms, such as fever, chills, cough, shortness of breath, or sore throat. Employers should rely on the CDC and other public health authorities for guidance on the emerging symptoms associated with the disease, which continue to evolve.
- All medical information obtained about employees must be stored separately from employees' personnel files. Medical information related to COVID-19 may be stored in existing medical files, but such information may not be included in employees' personnel files. This includes an employee's statement that he/she has the disease or suspects he/she has the disease, or other notes by the employer from questioning the employee about symptoms.
- Employers must maintain the confidentiality of employees' medical information—including information related to COVID-19—except for in very limited circumstances. In order to protect the public health, employers may, for example, disclose the names of employees with COVID-19 to public health agencies. Similarly, in order to protect their workforces, an employer can make a limited disclosure to employees of a confirmed case of COVID-19 that they may have been exposed to without identifying the affected employee's name or other identifying information.

#### ***Requests for Accommodations***

- Employers should be cognizant that employees with preexisting physical or mental disabilities may be entitled to reasonable accommodations, absent an employer's undue hardship.
- Employees who have already been provided with reasonable accommodations may require additional or altered accommodations. For example, employees may need different accommodations to telework than they did in the workplace. Employers may discuss with

employees whether the same or a different disability is the basis for the new or revised accommodation request.

- If a job can only be performed in the workplace, absent undue hardship, there may be reasonable accommodations employers can provide to offer protections to individuals whose preexisting disabilities put them at greater risk from COVID-19. The EEOC urges employers to be flexible in determining potential accommodations. For example, employers may consider low-cost solutions with materials already on hand or those that are easily obtained to reduce an employee's contact with others; temporary job restructuring of marginal job duties; temporary transfer to an open position; or modifying a work schedule or assignment.

### *The Interactive Process*

- Employers may still engage in the interactive process when employees request an accommodation. If a disability is not obvious or already known, during this process, employers can ask questions or request medical documentation to determine whether the employee's disability requires an accommodation, either the one requested or an alternative. Permissible questions include: how the disability creates a limitation; how the requested accommodation effectively addresses the limitation; whether another accommodation could effectively address the issue; and how a proposed accommodation will enable the employee to continue performing the essential functions of his/her position.
- If it is not practical for employers to engage in the full interactive process during the pandemic, they may consider shortening or foregoing the interactive process and granting requested accommodations on a temporary basis with a specified end date to suit changing circumstances based on public health directives, or granting a requested accommodation on an interim basis, with an end date, while awaiting receipt of the requisite medical documentation.
- Importantly, the EEOC has recognized that the circumstances of the pandemic are relevant to whether a requested accommodation poses an undue hardship for an employer. Employers may consider whether current circumstances create a "significant difficulty" in acquiring or providing certain accommodations considering the particular job and workplace. Aside from the feasibility of the request, factors to consider include the loss of some or all of the employer's income stream because of the pandemic and the amount of discretionary funds available at the time. If a requested accommodation poses an undue hardship, the EEOC urges the employer and employee to work together to determine if there is a workable alternative accommodation.

### *Return to Work*

- When government stay-at-home orders and other restrictions are modified or lifted and employees return to the workplace, employers may continue to make disability-related inquiries and conduct medical exams if such inquiries and exams are job-related and consistent with business necessity. This may be allowed if, based on objective medical evidence, it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety. Employers will be in compliance with the ADA if their inquiries and exams are consistent with the advice of the CDC and other public health authorities.
- When employees return to the workplace, employers may require them to use personal protective gear or engage in other infection control practices. However, if employees need an accommodation from these practices because of their disability or religion, the employer should engage in an interactive process described above to discuss the request and/or provide an alternative if it is feasible and does not pose an undue hardship.

### **Pandemic-Related Harassment and Discrimination**

The EEOC reminds employers that they can help reduce the chance of harassment and discrimination in their workplaces by communicating to their workforces that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including national origin or race. Employers should remind all employees that it is against the law to harass or discriminate against coworkers on the basis of race, national origin, color, religion, or any other protected basis.

Employers should also advise supervisors and managers to watch for, stop, and report any instances of harassment or discrimination. Employers should make clear that they will investigate any allegations of harassment or discrimination and take appropriate action.

### **Further Information**

We will continue to monitor publications from the EEOC. This post provides only a summary of the information from the EEOC's updated publication and is not a substitute for legal advice. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information about navigating through anti-discrimination laws during the pandemic.